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No. 05-642

In The
Supreme Court of the United States

JIM FLYNN, MARY COMER,
AND LEON MOONEYHAN,

Petitioners,

v.

LYNN MEERS, AS GUARDIAN FOR
LESLIE MEERS; AND JOEY ROGERS,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Kentucky

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether students with identified disabilities seeking relief for conduct that could have been addressed to any degree by the administrative procedures available under the Individuals with Disabilities Education Act, 20 U.S.C. § 1415 *et seq.*, may avoid exhaustion of such procedures by filing an action in a court of general jurisdiction raising federal and State civil rights claims and State law tort claims as non-educational injuries against school administrators in only their individual capacity?

PARTIES TO THE PROCEEDING

The Petitioners are Jim Flynn, Mary Comer, and Dr. Leon Mooneyhan, each in their individual capacity.[1] The Respondents are Lynn Meers, as Guardian for Leslie Meers, and Joey Rogers.

RULE 29.6 STATEMENT

Petitioners have no parent corporation and no publicly held company owns 10% or more of its stock.

[1] Another party, Debbie Medley, was a Defendant in the trial court action and has filed a separate Petition for Writ of Certiorari in this matter.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioners, Jim Flynn, Mary Comer, and Dr. Leon Mooneyhan, respectfully petition this Court for a writ of certiorari to review the October 29, 2004, Opinion of the Court of Appeals of Kentucky[2] reversing the decisions of the Shelby Circuit Court entered April 25, 2003, which had dismissed with prejudice the Complaints for failure to exhaust administrative remedies under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*.

OPINIONS BELOW

The Opinion of the Court of Appeals of Kentucky entered October 29, 2004, reversing and remanding, is officially reported as *Meers v. Medley*, 168 S.W.3d 406 (Ky.App. 2004) (hereinafter referred to as "*Meers*"). (App. p. 1.) The Court of Appeals also entered on December 22, 2004, an Order Denying Petition for Rehearing, which is unreported. (App. p. 12.)

The Order of the Shelby Circuit Court entered April 25, 2003, dismissing the action filed by Respondent Meers is unreported. (App. p. 14.)

The Order of the Shelby Circuit Court entered April 25, 2003, dismissing the action filed by Respondent Rogers, is likewise unreported. (App. p. 15.)

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[2] Pursuant to a Prehearing Conference Order entered August 29, 2003, the Court of Appeals of Kentucky consolidated the separate appeals filed by the Respondents herein from the Shelby Circuit Court's respective orders of dismissal. (App. p. 10.)

The Order of the Supreme Court of Kentucky entered on August 17, 2005, denying the Motion for Discretionary Review is unreported. (App. p. 16.)

JURISDICTION

The Opinion of the Court of Appeals of Kentucky was entered on October 29, 2004, and a timely Petition for Rehearing was denied by that court on December 22, 2004. (App. pp. 1, 12.) A timely Motion for Discretionary Review to the Supreme Court of Kentucky was likewise denied by Order entered August 17, 2005. (App. p. 16.) This Court, therefore, has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

The provisions of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. § 1400 *et seq.* (West 2000) at issue in this matter are § 1415(i)(2)(A) and § 1415(l) and are set forth respectively below:[3]

§ 1415. Procedural safeguards

. . . .

(i) Administrative procedures

. . . .

[3] Congress further amended the IDEA in Public Law 108-446, the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), with no substantive changes to the provisions in issue as presented in this Petition for Writ of Certiorari.

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

. . . .

(l) Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 *et seq.*], title V of the Rehabilitation Act of 1973 [29 U.S.C.A § 791 *et seq.*], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

STATEMENT OF THE CASE

Respondents, Lynn Meers, guardian of Leslie Meers, and Joey Rogers (hereinafter for convenience "the Students"), filed separate Complaints in the Shelby Circuit Court against the Petitioners (hereinafter for convenience "School District Administrators") and teacher, Debbie Medley. At all times pertinent to the claims arising herein, Petitioner Jim Flynn served as the Principal of the Shelby County High School, Petitioner Mary Comer served as the Special Education Coordinator, and Petitioner Dr. Leon Mooneyhan served as the Superintendent of the Shelby County Public Schools. The Shelby County Public Schools (Board of Education of Shelby County), as a body politic and corporate, was not made a party defendant in the trial court actions. The School District Administrators were sued only in their respective individual capacities.

The Students initiated suit against the School District Administrators under the Eighth and Fourteenth Amendments to the United States Constitution pursuant to 42 U.S.C. § 1983, the State's civil rights act, and the state law torts of intentional infliction of emotional distress, assault, battery, negligence, and defamation. The respective separate Complaints of the Students mirrored each other with allegations of intrusions to body integrity, negligent and/or intentional abuse in the context of a public school and as prohibited by school policy, assault, battery, and defamation. The Students further alleged the School District Administrators were negligent with respect to the monitoring and supervision of the instructional services being provided to them by teacher Medley in the classroom setting and complained of an unstable classroom environment.

The Students had been identified as individuals with disabilities pursuant to the procedures mandated under the IDEA and corresponding state laws and regulations and were receiving educational services required thereunder. The Students each had an individualized education program ("IEP"). The procedural safeguards available under 20 U.S.C. § 1415 had been provided by photocopy and explained many times at IEP team meetings.[4] The procedural safeguards include notice of the "opportunity to present complaints" about the free appropriate public education ("FAPE") the Students each were entitled to receive. *See* Section 1415(d). However, no administrative complaint was presented on behalf of the Students and, as well, there was no request for a due process hearing concerning any of the allegations raised in their respective lawsuits filed in the Shelby Circuit Court. Consequently, there was no effort made in any way to have concerns regarding their treatment or educational services by teacher Medley addressed administratively. That is, there were no steps taken to exhaust, or even initiate, administrative remedies.

The School District Administrators, and as well teacher Medley, filed a motion to dismiss the Students' respective lawsuits in the Shelby Circuit Court for the obvious failure to exhaust available administrative remedies prior to filing the civil actions. The Shelby Circuit

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[4] The required membership of an IEP team is designated by federal statute. 20 U.S.C.A. § 1414(d)(1)(2) (West 2000). This membership includes the parents of the child, at least one regular education teacher, at least one special education teacher, a supervisory representative of the local agency with particular authority and duties, an individual capable of interpreting evaluation results, sometimes the child, and others at the discretion of the parent or local educational agency.

Court granted the School District Administrators' motion to dismiss upon a showing the Students had exercised no administrative procedure to have their concerns and allegations addressed. (App. pp. 14, 15.)

The Students appealed the Shelby Circuit Court's dismissal of their respective lawsuits to the Court of Appeals of Kentucky on the grounds they were not required to exhaust administrative remedies because there were no claims expressly asserted in their respective complaints under the IDEA. In an Opinion entered October 29, 2004, the Court of Appeals of Kentucky reversed the trial court's dispositive orders and expressly held that IDEA was inapplicable, stating "there are no claims asserted in the complaints under [IDEA]." (App. pp. 2-3, 8.) The Court of Appeals indicated an appreciation that the key issue involved was whether the Students were required to exhaust administrative remedies under IDEA before filing suit. (App. p. 4.) But believing there to be a lack of consistency among courts interpreting the exhaustion of remedies provision of the IDEA, the Court of Appeals of Kentucky held the Students' claims related to allegations of "physical and mental assault and/or abuse," which were determined to not fall within the scope of the IDEA and, as a result, held the exhaustion of the IDEA's administrative remedies before filing suit in court was not required. (App. p. 8.) The Court of Appeals, therefore, reversed the trial court's decision and remanded the case for proceedings not inconsistent with its Opinion. (App. p. 8.)

The School District Administrators filed in the Court of Appeals of Kentucky a timely Petition for Rehearing which was denied without any further comment on the

issues of the Students having failed to exhaust administrative remedies under the IDEA. (App. p. 12.)

A timely Motion for Discretionary Review was filed with the Supreme Court of Kentucky on behalf of the School District Administrators but was denied. (App. p. 16.)

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS OF KENTUCKY DECISION VIOLATED THE CLEAR INTENT OF CONGRESS BY FAILING TO PROPERLY APPLY THE ADMINISTRATIVE REMEDIES EXHAUSTION REQUIREMENT CODIFIED IN THE IDEA.

The Court of Appeals of Kentucky in *Meers* has decided an important federal question that has not been, but should be addressed by this Court. That important federal question is the proper application of the requirement of exhaustion of administrative remedies prior to the initiation of a civil proceeding in a court of general jurisdiction as codified in the IDEA. *See* 20 U.S.C.A. § 1415(l) (West 2000). The *Meers* Decision excused the failure to exhaust without identifying any recognized exception to the requirement and in doing so, violated the clear, longstanding intent of Congress that may be easily discerned by reviewing some of the legislative history of the IDEA and its predecessor.

Congress passed Public Law (P.L.) 94-142 in 1975 creating what was to become referred to as the Education for All Handicapped Children Act ("EAHCA" and sometimes "EHA"). The EHA was enacted as is a funding

statute requiring public school districts throughout the United States to identify and appropriately educate handicapped students in order to receive educational funds appropriated by Congress. The backbone of the enforcement of the EHA, without room for doubt, was contained in the "procedural safeguards" section, § 1415, and has continued to be over the past thirty (30) years. This procedural section is a parents' remedies provision. The success or failure of the EHA, the predecessor to the IDEA, has always depended upon parents of disabled children having the opportunity to assert their rights in the interest of their child receiving a beneficial education. The list of procedural rights set forth in § 1415 is quite extensive, and, *inter alia*, provides that when parents are dissatisfied with an identification, evaluation, or placement decision, they may voice their objection and have unqualified access to a full administrative evidentiary hearing before an impartial due process hearing officer. At such a hearing the parents have a right to be represented by counsel, to present evidence and confront, cross-examine, and compel the attendance of witnesses, to receive a written or electronic record of the hearing, and to receive a written or electronic findings of fact and decision. The EHA's procedural safeguards section made explicit that administrative review at the local and State level was necessary before an actionable claim concerning the education of a disabled student could go to court.

In 1984 this Court rendered its opinion in *Smith v. Robinson*, 468 U.S. 992 (1984), partially superceded by statute as noted in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 235 (1995)). In *Smith*, as developed in the lower courts, the parents of a child suffering cerebral palsy and other handicaps filed a lawsuit asserting claims for relief

based upon state law, the EHA, § 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794], and on the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution [under 42 U.S.C. § 1983]. The United States Court of Appeals for the First Circuit had concluded because the proceedings below essentially had been to enforce provisions of the EHA, which statute did not provide for the payment of attorney's fees, the parents would not be entitled to such fees even though having prevailed against the involved school district that had the responsibility to appropriately educate their handicapped child. This Court affirmed holding as had the First Circuit the action and relief granted in the case "fell within the reach of the EHA, a federal statute that establishes a comprehensive federal-state scheme for the provision of special education to handicapped children, but that does not provide for attorney's fees" 468 U.S. at 1002. This Court declined to condone the pleading of causes of action under other statutes and the Federal Constitution itself in order to create claims where, if successful, a litigant could obtain attorney's fees reimbursement. Referencing the consideration of the issue by the First Circuit Court of Appeals, this Court stated:

> "In the view of the Court of Appeals, the fact that the § 1983 claims alleged here were based on independent constitutional violations rather than violations of the EHA was immaterial. The constitutional claims alleged – a denial of due process and a denial of a free appropriate public education because of handicap – are factually identical to the EHA claims. If a litigant could obtain fees simply by an incantation of § 1983, fees would become available in almost every case.
>
> 468 U.S. at 1003.

The value of this Court's decision in *Smith v. Robinson* in the context of the important federal question being requested to be reviewed in the present matter, comes from a further strong expression of legislative intent by Congress when P.L. 99-372, the Handicapped Children's Protection Act of 1986 ("HCPA"), was enacted in response to the *Smith* decision. Congress made especially clear in the 1986 legislation attorney's fees would be available in a court action under the EHA and that an action under § 504 and other federal statutory provisions, as well as the United Constitution, were available, but that the exhaustion of administrative remedies provided for in the EHA was a condition precedent to such litigation. The exhaustion provisions of P.L. 99-372 created new subsection (f) to § 1415 (now codified as § 1415(l)), which read:

> "(f) Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part."
>
> 20 U.S.C. § 1415(f) (1986).

With the language of this new subsection, if there had been any doubt, Congress made clear its intent administrative remedies were to be exhausted prior to filing a civil action where relief is also available under the EHA.

The decision of the Court of Appeals of Kentucky in *Meers* amounts to an end run around the administrative procedural safeguards backbone of the IDEA, and its predecessor, and serves to negate Congress' intent that is evident from the thirty (30) year history of the Act. Congress' intent that local school district personnel should be afforded the opportunity to first address issues of complaint by the parents of disabled students is supported by other language in IDEA such as that in § 1415(i)(2)(A) and (B) authorizing the bringing of a civil action by a party aggrieved by administrative "findings and decision" with the reviewing court to "receive the records of the administrative proceeding." The seminal review by this Court of the EHA and the obligation to provide a free appropriate public education to each identified handicapped child in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), further highlights the significance of Congress' intent as to the exhaustion of administrative remedies before a civil action is filed. Then Associate Justice Rehnquist, prior to ascending to the position of Chief Justice of this Court, wrote that the courts "must be careful to avoid imposing their view of preferable educational methods upon the states" regarding the provision of specialized instruction and related services to eligible identified disabled students. 458 U.S. at 207.

The Students in this matter, undoubtedly recognizing the requirement to exhaust administrative remedies under the IDEA prior to filing litigation, did not name as a defendant in their trial court complaints the Shelby County Public Schools (Board of Education of Shelby County), which is the State entity subject to complying with the Act for the receipt of Federal funding, but rather

made party defendants, *in their individual capacity*, the School District Administrators herein. Moreover, rather than expressly alleging the Shelby County Public Schools through its personnel had failed to properly implement their respective IEPs, or use appropriate methodologies for instruction or modification of behavior, the Students couched their civil action allegations in terms of placing the students in a position of danger, negligently or intentionally being abused, and otherwise violating the Students' rights, privileges, and immunities, pursuant to 42 U.S.C. § 1983, under the Eighth and Fourteenth Amendments to the United States Constitution. *Cf. Smith v. Robinson* (holding that such constitutional claims are factually identical to EHA claims).

It stood undisputed the Students, through their parents or representatives, never invoked any of the procedural safeguards listed in Section 1415. Clearly none of the three School District Administrators was given an opportunity to consider complaints about the educational services the Students were receiving or regarding the circumstances under which those services were allegedly being provided. If educational instruction is believed to be inappropriate, relief is available utilizing the procedural safeguards of § 1415. Likewise, if instructional techniques or methodologies used are unsatisfactory, relief is available utilizing the procedural safeguards of § 1415. If behavior improvement plans are believed too stringent or simply unworkable, relief is available utilizing the procedural safeguards of § 1415. If conduct of teachers or other implementers of IEP goals and short-term objectives is felt to be too aversive or even deemed to be abusive, relief is available utilizing the procedural safeguards of § 1415. Petitioner Comer, as the Coordinator of Special Education,

is the overseer of special education delivery and should have been given the opportunity to be a part of an IEP team meeting and even an administrative due process hearing to consider relief desired on behalf of a disabled student. Petitioner Flynn, as Principal of the Shelby County High School, was subject to being a member of the IEP team to address the parents' or guardian's complaints concerning delivery of the specially designed instruction in the IEPs of the Students. As principal, he was the evaluator of teachers assigned to the high school with the ability to address concerns brought to his attention through the evaluation process created by Kentucky education laws. Dr. Leon Mooneyhan, as Superintendent, had the State statutory authority to take all personnel action in the school district regarding matters brought to his attention in an administrative process as required to be in place under § 1415 and which was irrefutably in place in the Shelby County Public Schools.

The Court of Appeals of Kentucky in its decision in *Meers* evidenced an appreciation of the requirement of exhaustion of administrative remedies as intended by Congress, but while claiming to apply a recent Kentucky United States District Court decision on the subject, in fact only paid lip service to the requirement. The Court of Appeals of Kentucky determined the claims filed by the Students were "not within the scope of the IDEA and, thus, exhaustion of administrative remedies under the Act [was] not required." (App. p. 8.) In reaching its decision, the Court purported to rely upon the reasoning contained in *S.S., ex rel. Stutts v. Eastern Kentucky University*, 307 F.Supp.2d 853 (E.D.Ky. 2004) (vacated as moot upon exhaustion of remedies during pendency of appeal, 125 Fed. Appx. 644 (6th Cir. 2005)), wherein that federal

district court looked to the "nature of the wrongs alleged" to determine whether to apply the administrative remedies exhaustion requirement codified in the IDEA. In *Stutts*, the plaintiff filed a complaint on behalf of the minor student who was disabled and was receiving educational services under the IDEA. The plaintiff in *Stutts* alleged the minor child was subject to abuse and harassment because of his disability and, therefore, was denied "a fair and equitable education." *Stutts*, 307 F.Supp.2d at 855. Litigation was commenced for violations of the Americans with Disabilities Act, 42 U.S.C. § 12132 ("ADA"), the Rehabilitation Act of 1973, 29 U.S.C. § 794, state law torts relating to harassment, physical abuse, and outrageous conduct, and Federal constitutional rights of due process and equal protection guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution pursuant to 42 U.S.C. § 1983. *Id.*, 307 F.Supp.2d at 856. The complaint in *Stutts* alleged no direct violations under the IDEA. *Id.*

Although no provisions of the IDEA were invoked, the United States District Court for the Eastern District of Kentucky held in *Stutts* the plaintiff's claims under the ADA, the Rehabilitation Act of 1973, and 42 U.S.C. § 1983 were subject to the administrative exhaustion requirements of the IDEA. *Stutts*, 307 F.Supp.2d at 856. In so holding, the federal district court found that 20 U.S.C. § 1415 of the IDEA "requires the exhaustion of administrative remedies prescribed under the IDEA, even when the plaintiffs do not rely on the IDEA as the source of their claims, if their claim is sufficiently related to 'free appropriate public education' to a disabled child under the IDEA." *Id.*, 307 F.Supp.2d at 857. The Kentucky federal district court further concluded courts have looked to the

"nature of the wrongs" alleged to determine "whether relief is available under the IDEA where claims are brought pursuant to other statutes." *Id.* The *Stutts* court reasoned that "[c]omplaints concerning the general disciplinary practices of a school district have been understood to relate to the way that the district provided education" and therefore within the purview of the IDEA; whereas, "allegations of physical assault or sexual abuse of a student by a school staff member or administrator would fall outside the scope of the IDEA since they are not related to the way that a school provides education." *Id.*, 307 F.Supp.2d at 858. When applying this standard, the federal district court in *Stutts* looked to "whether the actions alleged . . . may best be understood as part of how" the child's education was provided or "whether they are the type of abusive *ultra vires* acts by teachers or school administrators that lie outside of the IDEA's scope." The federal district court found the majority of the allegations arose from the decisions concerning whether or not to discipline the minor child, a portion of the complaint alleged the failure to appropriately design an IEP, and the complaint alleged the defendant owed a duty to the minor child "arising from Defendant's special relationship to him as a student with a disability, an obligation addressed by the IDEA." *Id.*, 307 F.Supp.2d at 858. Based on these facts, the federal district court held the claims raised by the plaintiff in *Stutts* related to complaints about how the school district provided an education to the child despite plaintiff's claims that the allegations constituted "constitutional and statutory violations independent of the IDEA." *Id.* Exhaustion of administrative remedies under the IDEA, therefore, was required before filing suit in court. *Id.* However, since the plaintiff failed to adhere to

the exhaustion requirement, the *Stutts* court dismissed all claims raised therein. *Id.*

Like the claims raised in *Stutts*, the Students' trial court Complaints raised essentially common law tort allegations and avoided expressly asserting violations of the IDEA. Nevertheless, the Students' Complaints directly pertained to how the Students' education was being provided. The trial court Complaints implicitly raised educational placement, provision of services, implementation of educational programming, qualifications of the provider of educational programming, potential qualification for related services, behavior management, and implementation of educational programming, but never within the context of the IDEA. However, these claims are precisely the sorts of issues which call for the application of administrative expertise through the IDEA hearing apparatus because judges are "generalists with no expertise in the educational needs of handicapped children and will benefit from fact-finding of a state agency with expertise in the field." *Doe v. Smith*, 879 F.2d 1343 (6th Cir. 1989); *quoting Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, 873 F.2d 933, 935 (6th Cir. 1989). By artful pleading the Students avoided in their initial pleading in the trial court even a passing reference to the IDEA.

Despite the factual similarities with *Stutts* the Court of Appeals of Kentucky determined the Students' claims did not fall within the scope of the IDEA and reversed the trial court's determination that they did. (App. p. 8.) The Court of Appeals' decision cannot be squared with Congress' intent in IDEA relative to exhaustion. Unlike in *Stutts*, the Court of Appeals of Kentucky made no real effort to consider the "nature of the wrong alleged" and instead obviously modified the rubric for exhaustion so as

to look at the "name" of the wrong alleged. The Court of Appeals of Kentucky decision in this matter that claims implicating the IDEA were not invoked is simply erroneously in conflict with Congress' obvious legislative intent.[5] The error evident in the application of the IDEA administrative exhaustion requirement squarely presents an important federal question not previously addressed and settled by this Court.

II. THE COURT OF APPEALS OF KENTUCKY DECISION CONFLICTS WITH FEDERAL AND STATE COURT DECISIONS ADDRESSING THE REQUIREMENT OF EXHAUSTION OF ADMINISTRATIVE REMEDIES UNDER THE IDEA.

The Court of Appeals of Kentucky in *Meers* has decided an important federal question in a way that conflicts with the decisions of a number of Courts of Appeal of the United States, including the Court of Appeals of the Sixth Circuit, and at least one other State court of last resort.

The Federal Appeals Court having federal appellate jurisdiction over the Commonwealth of Kentucky directly considered the exhaustion requirements of the predecessor to the IDEA, the EHA, sixteen years ago in *Crocker v.*

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[5] In the IDEIA of 2004, effective July 1, 2005, Congress enhanced and strengthened its intent as to the exhaustion of remedies by creating several new requirements that will have a significant bearing even at the due process hearing stage of administrative proceedings. After a parent files a request for a due process hearing to address a complaint, but prior to the due process hearing being conducted, a local educational agency, *i.e.*, public school district, is mandated to convene a meeting (resolution session) "with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint. . . ." § 1415(f)(1)(B)(i) (West 2005).

Tennessee Secondary Sch. Athletic Ass'n, 873 F.2d 933 (6th Cir. 1989). After noting the procedural safeguards required under the Act, the Sixth Circuit confronted the requirement for the exhaustion of administrative remedies:

> "Every court that has considered the question has read this statutory scheme as a requirement for the exhaustion of administrative remedies. In case after case courts have read the statutory scheme to require parents and guardians to *use* the state process which the act specifies shall be provided to them. *Ass'n for Retarded Citizens of Alabama v. Teague, Inc.*, 830 F.2d 158, 160 (11th Cir. 1987); *Doe ex rel. Gonzales v. Maher*, 793 F.2d 1470, 1490 (9th Cir. 1986), *modified on other grounds sub nom. Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988); *Timm v. Metro. School Dist. of Wabash County, Inc.*, 722 F.2d 1310, 1316 (7th Cir. 1983); *Monahan v. State of Neb.*, 687 F.2d 1164, 1168 (8th Cir. 1982), *cert. denied sub. nom. Rose v. State of Neb.*, 460 U.S. 1012, 75 L.Ed.2d 481, 103 S.Ct. 1252 (1983); *McGovern v. Sullins*, 676 F.2d 98, 99 (4th Cir. 1982); *Riley v. Ambach*, 668 F.2d 635, 640 (2d Cir. 1981); *Ezratty v. Com. of Puerto Rico*, 648 F.2d 770, 775 (1st Cir. 1981); *Secor v. Richmond School Joint Dist. No. 2 Lisbon-Pewaukee*, 689 F.Supp. 869, 873 (E.D.Wis. 1988); *Mitchell v. Walter*, 538 F.Supp. 1111, 1113 (S.D.Oh. 1982); *Parks v. Pavkovic*, 536 F.Supp. 296, 302 (N.D.Ill. 1982). *See also Eggers v. Bullitt County School Dist.*, 854 F.2d 892, 894 (6th Cir. 1988).
>
> "Indeed, we cannot imagine any other reading of the statute. Only parties 'aggrieved' by the results of the administrative process are granted a right of action in state or federal court. 20 U.S.C. § 1415(e)(2). To allow parents to come directly to

> federal courts would render the entire scheme of § 1415 nugatory. *Smith v. Robinson*, 468 U.S. 992, 1011, 82 L.Ed.2d 746, 104 S.Ct. 3457 (1984). In particular, it would frustrate the Act's specific direction that in 'any action' brought in state or federal court under this section, 'the court shall receive the records of the administrative proceedings[.]'" 20 U.S.C. § 1415(e)(2).

873 F.2d at 935.

More recently the Sixth Circuit Court of Appeals again reviewed the exhaustion requirement under the IDEA, specifically 20 U.S.C. § 1415(l), in *Covington v. Knox County School System*, 205 F.3d 912 (6th Cir. 2000). In *Covington*, the student had graduated with a special education diploma and had filed an administrative complaint before commencing an action in federal court under 42 U.S.C. § 1983 for Federal constitutional violations as well as state law tort claims. Various disciplinary measures were alleged to have been abusive or otherwise improper. The Sixth Circuit rejected the argument advanced in *Covington* that the claims did not arise under the IDEA because they concerned abusive behavior and actions constituting constitutional violations and therefore exhaustion would not be required. The court noted disagreement with the plaintiff's position that by requesting monetary damages alone she was excused from exhausting administrative remedies. 205 F.3d at 916. The Court of Appeals for the Sixth Circuit proceeded further with its analysis of the exhaustion requirements of the IDEA by examining whether there existed a factual basis for application of an exception to the exhaustion requirement. The court stated:

> "Nonetheless, both the Supreme Court and this court have held that exhaustion is not required under the IDEA in certain circumstances. Exhaustion is not required if it would be futile or inadequate to protect the plaintiff's rights. *See Honig [v. Doe]*, 484 U.S. at 326-27, 108 S.Ct. 592; *[Doe v.] Smith*, 879 F.2d at 1343; *Crocker I*, 873 F.2d 936. Nor is exhaustion required if the plaintiffs were not given full notice of their procedural rights under the IDEA. See *Crocker I*, 873 F.2d at 936. The burden of demonstrating futility or inadequacy rests on the party seeking to bypass the administrative procedures. *See Honig*, 484 U.S. at 327, 108 S.Ct. 592."
>
> 205 F.3d at 917.

The *Covington* court then determined, appropriately so, that as the student in *Covington* had graduated and was no longer in school, no administrative process was available and consequently exhaustion would be futile.

As noted above, the Court of Appeals for the Sixth Circuit in *Crocker* collected a number of cases from sister Federal Courts of Appeal specifically holding the exhaustion of the administrative procedures of the IDEA is required absent a showing such exhaustion would be futile or inadequate, a consideration that certainly was not addressed in the Court of Appeals of Kentucky decision in *Meers* nor raised by the Students below.

In *Frazier v. Fairhaven School Committee*, 276 F.3d 52, 63 (1st Cir. 2002), turning to an analogous administrative exhaustion requirement found in the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), the Court of Appeals for the First Circuit declined to allow the parents of a disabled student to pursue a § 1983 claim without first

exhausting the IDEA's administrative process as "[t]hat course of action would allow a plaintiff to bypass the administrative procedures merely by crafting her complaint to seek relief that educational authorities are powerless to grant. This would subvert not only the very existence of a mandatory exhaustion requirement but also the overall scheme that Congress envisioned for dealing with educational disabilities."

Other Federal courts of appeal have likewise concluded on the IDEA exhaustion issue. The Second Circuit Court of Appeals in *Mrs. W. v. Tirozzi*, 832 F.2d 748, 756 (2d Cir. 1987), stated, looking at the EHA, that "[w]hen parents choose to file suit under another law that protects the rights of handicapped children – and the suit could have been filed under the EHA – they are first required to exhaust the EHA's remedies to the same extent as if the suit had been filed originally under the EHA's provisions." The court commented the "Act's exhaustion requirements . . . were not eliminated or cut-back by the Handicapped Children's Protection Act of 1986." *Id.*

In *Charlie F. v. Bd. of Educ. of Skokie School Dist. 68*, 98 F.3d 989 (7th Cir. 1996), a student brought suit by and through his parents under 42 U.S.C. § 1983, the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, and state law torts against a teacher, principal, superintendent, and school district. *Id.*, 98 F.3d 990-91. The suit arose from alleged "gripe sessions" held by the teacher in which the disabled student was allegedly subject to humiliation by other students leading to, *inter alia*, fist fights and corresponding disruption of educational progress. *Id.* The parents moved the child to a different school and filed suit naming the foregoing school district personnel without

explicitly asserting claims under the IDEA. *Id.* Even though a Federal constitutional claim was forwarded against individuals, the Seventh Circuit Court of Appeals directed the dismissal of the case for "failure to use the IDEA's administrative remedies." *Id.*, 98 F.3d at 993. Rather than using a "cause of action" test to determine whether exhaustion was required, the Seventh Circuit Court of Appeals analyzed whether the complaint implicated relief that is *available* under the IDEA, noting "[t]he statute speaks of available relief, and what relief is 'available' does not necessarily depend on what the aggrieved party wants." *Id.*, 98 F.3d at 991. The court accordingly read "'relief available' to mean relief for the events, condition, or consequences of which the person complains, not necessarily relief of the kind the person prefers." *Id.*, 98 F.3d at 992. Thus, the court concluded that when both the genesis and the manifestations of the problems forming the basis of the complaint are educational, exhaustion of administrative remedies under the IDEA is required "even if the plaintiff wants a form of relief that the IDEA does not supply." *Id.*, 98 F.3d at 992-93. In so holding, the court reasoned that local school officials must first be given the opportunity to remedy a plaintiff's injuries that are part and parcel to the educational process before the plaintiff can file suit. *Id.*, 98 F.3d at 993.

Recently, the Court of Appeals for the Ninth Circuit again considered exhaustion of the IDEA remedies in *Blanchard v. Morton School Dist.*, 420 F.3d 918 (9th Cir. 2005) (time for seeking writ of certiorari not yet elapsed). That court had earlier addressed the issue in *Robb v. Bethel Sch. Dist. #403*, 308 F.3d 1047 (9th Cir. 2002), and in *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271 (9th Cir.

1999). The Court of Appeals for the Ninth Circuit noted in *Blanchard*:

> "Money damages for retrospective and non-educational injuries are not available under the IDEA. *See Witte*, 197 F.3d at 1275; *see also Polera v. Bd. of Educ. of the Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 486 (2d Cir. 2002); *Charlie F.*, 98 F.3d at 991; *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402, 407 (6th Cir. 1991). That alone is not dispositive, for a plaintiff cannot avoid the IDEA's exhaustion requirement simply by limiting a prayer for relief to money or services that are not provided under the IDEA. *Robb*, 308 F.3d at 1049. The dispositive question therefore is whether Blanchard is seeking remedy for injuries that could be redressed to any degree by the IDEA's administrative procedures. *Id.* at 1050."
>
> 420 F.3d at 921.

The court then concluded as it had in *Witte*, and consistent with its decision in *Robb*, that where the record demonstrated all educational issues had been resolved to the parties' mutual satisfaction through the administrative process, further exhaustion of the administrative remedies under the IDEA was not required. *Id.* The Ninth Circuit held in *Blanchard* the mother of the disabled student "has resolved the educational issues implicated by her son's disability and has obtained the educational relief available under the IDEA on behalf of her son." *Id.*, 420 F.3d at 922.

Two other Federal Circuit Courts of Appeal have similarly addressed the IDEA exhaustion requirement: *Cudjoe v. Independent Sch. Dist. No. 12*, 297 F.3d 1058, 1067 (10th Cir. 2002) (holding exhaustion of administrative

remedies is required when the alleged injuries are educational in nature and thus presumptively redressable under the IDEA), and *N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376 (11th Cir. 1996) (holding the very reason for exhaustion of administrative procedures under the IDEA is "'[to prevent] deliberate disregard and circumvention of agency procedures established by Congress'") (citation omitted).

The *Meers* Court of Appeals of Kentucky decision also conflicts with at least one other decision of a State appellate court of last resort. In *Jenkins v. Carney-Nadeau Public School*, 505 N.W.2d 893 (Mich.App. 1993) (review by the Supreme Court of Michigan denied, 514 N.W.2d 766 (1994)), the Court of Appeals of Michigan held exhaustion under the state's IDEA regulatory scheme was required prior to the filing of a civil rights disability discrimination claim under a state civil rights statute in circuit court. *Id.*, 505 N.W.2d at 895. The plaintiff alleged the public school system discriminated against her on the basis of a handicap in violation of the State's civil rights act by not allowing "her to use her motorized wheelchair in the school building," by forcing her "to walk up stairs, which caused her pain," and by drawing attention to her handicap by requiring an aid to accompany her at school when such assistance was unnecessary. *Id.*, 505 N.W.2d at 893-94. Rather than addressing such complaints under the state's IDEA regulatory scheme by exhausting administrative procedures to challenge her IEP, the plaintiff, like the Students herein, filed suit directly in circuit court for violations of a state civil rights statute. *Id.*, 505 N.W.2d at 894. The plaintiff argued she had "an independent right to sue under that section." *Id.* However, having recognized the complained-of conditions may be redressed under the state's IDEA regulatory scheme, which required exhaustion of administrative remedies before filing suit in state or federal

court, the Court of Appeals of Michigan disagreed and held a plaintiff cannot circumvent the administrative procedures of the state's special education act by filing suit under other statutes or laws. *Id.*, 505 N.W.2d at 895.

The decision in *Meers* is squarely at odds with the Federal appellate court cases and at least one other decision by a State appellate court of last resort as noted above that have ruled on the IDEA exhaustion requirement. Thus, review by this Court by granting this Petition for Writ of Certiorari is warranted.

CONCLUSION

The decision of the Court of Appeals of Kentucky in *Meers* negated the requirement for local school district personnel to have an opportunity to first apply their expertise to redress claims to any extent available under the IDEA before suit is filed in court. The *Meers* decision is inconsistent with the clear legislative intent as to exhaustion of administrative remedies under IDEA that is easily traceable to the enactment of the Act thirty (30) years ago. This Court is earnestly urged to grant this Petition for Writ of Certiorari to address this important question of federal law.

Respectfully submitted,

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RENDERED: OCTOBER 29, 2004; 10:00 a.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001003-MR

LYNN MEERS, AS GUARDIAN
FOR LESLIE MEERS — APPELLANT

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE WILLIAM P. STEWART, JUDGE
ACTION NO. 02-CI-00077

v.

DEBBIE MEDLEY; JIM FLYNN,
MARY COMER; AND
LEON MOONEYHAN — APPELLEES

AND

NO. 2003-CA-001008-MR

JOEY ROGERS — APPELLANT

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NO. 02-CI-00076

v.

DEBBIE MEDLEY; JIM FLYNN,
MARY COMER; AND LEON
MOONEYHAN — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Lynn Meers brings Appeal No. 2003-CA-001003-MR from an April 25, 2003, Order of the Shelby Circuit Court. Joey Rogers brings Appeal No. 2003-CA-001008-MR from an April 25, 2003, Order of the Shelby Circuit Court. We reverse and remand both appeals.

Meers and Rogers were students at Shelby County High School. Both suffer from severe disabilities and were placed into the special education program at the high school. On February 7, 2002, Meers and Rogers filed complaints in the Shelby Circuit Court, alleging that their teacher, Debbie Medley, physically and mentally abused them. Specifically, it was further alleged that both Meers and Rogers were "berated, harassed, embarrassed, abused physically and mentally by Medley."

Meers and Rogers also claimed that Jim Flynn (Principal of Shelby County High School), Mary Comer (Special Education Coordinator), and Leon Mooneyhan (Superintendent) (collectively referred to as appellees) "acted negligently, recklessly and/or grossly negligently" by failing to remove Medley as a teacher, by failing to monitor Medley, by failing to act on complaints about Medley, and by failing to enforce school policies. Each defendant/appellee was named in his/her individual capacity only.

Meers and Rogers claimed relief under 42 U.S.C.A. § 1983 (West 2003 & Supp. 2004), Kentucky Revised Statutes Chapter 344 (the Civil Rights Act), the torts of intentional infliction of emotional distress, assault, battery, negligence, and defamation. There are no claims asserted in the complaints under the Individuals With

Disabilities Education Act (IDEA) (20 U.S.C.A. § 1400-1491o (West 2003 & Supp. 2004).

Appellees filed motions to dismiss in each case for lack of subject matter jurisdiction (Ky. R. Civ. P. (CR) 12.02), claiming Meers and Rogers failed to exhaust administrative remedies as required by the IDEA. The court dismissed the actions. These appeals follow.

In dismissing Meers' and Rogers' actions, the circuit court merely stated "[u]pon motion being made, and the Court being sufficiently advised, IT IS HEREBY ORDERED that this action be DISMISSED with prejudice." No grounds are stated for dismissal nor can we determine what part of the record, if any, was considered by the court in this ruling. As there exists interrogatory answers, verified responses, and other documents filed in the record, we assume the circuit court considered same and, thus, view the orders dismissing the actions as summary judgments. *See Ferguson v. Oates*, Ky., 314 S.W.2d 518 (1958).

Summary judgment is proper where there exists no issue of material fact and movant is entitled to judgment as a matter of law. CR 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476 (1991).

Resolution of both appeals centers upon a singular issue – whether Meers and Rogers *were* required to exhaust administrative remedies under the IDEA. For the reasons hereinafter stated, we are of the opinion the IDEA is inapplicable; thus, the circuit court improperly dismissed the actions.

The specified stated purposes of the IDEA are:

> (1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;
>
> (B) to ensure that the rights of children with disabilities and parents of such children are protected; and
>
> (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;
>
> (2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;
>
> (3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and
>
> (4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

20 U.S.C.A. § 1400(d) (West 2000 & Supp. 2004).

At issue in these appeals is the exhaustion of administrative remedies provision found in the IDEA, which reads as follows:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C.A. § 1415(1) (West 2000 & Supp. 2004). Under the above exhaustion provision, an individual is required to exhaust administrative remedies before bringing a judicial action to obtain relief under the IDEA or before bringing a judicial action to obtain relief that is also available under the IDEA. The Courts have not been consistent in interpreting the exhaustion of remedies provision of the IDEA. In *Covington v. Knox County School System*, 205 F.3d 912, 915-916 (6th Cir. 2000), it was specifically observed that courts have given the provision varied interpretations:

> We note that some courts have interpreted § 1415 to require the exhaustion of administrative remedies even when the plaintiffs do not rely exclusively on the IDEA as the source of their claims. For example, several courts have held that exhaustion is required when plaintiffs bring § 1983 suits based on violations of the IDEA. *See*, e.g., *N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir.1996), *cert. denied*, 519 U.S. 1092, 117 S. Ct. 769, 136 L.Ed.2d 715 (1997);

> *Mrs. W. v. Tirozzi*, 832 F.2d 748, 756 (2d Cir.1987); *W.L.G. v. Houston County Bd. of Educ.*, 975 F. Supp. 1317, 1328 (M.D.Ala.1997). Additionally, some courts have held that whenever a claim falls within the purview of the IDEA – that is, whenever it relates to the provision of a "free appropriate public education" to a disabled child exhaustion is required, whether or not the plaintiff characterizes the claim as one arising under the IDEA.

In the case sub judice, we are persuaded by the reasoning contained in *Stutts v. Eastern Kentucky University*, 307 F. Supp. 2d 853, 857-858 (E.D.Ky. 2004) and adopt its interpretation of the exhaustion of remedies provision:

> In determining whether relief is available under the IDEA where claims are brought pursuant to other statutes, courts have looked to the nature of the wrongs alleged. Complaints concerning the general disciplinary practices of a school district have been understood to relate to the way that the district provides education and "thus necessarily come within the scope of the IDEA." *Covington*, 205 F.3d at 916 (*citing Hayes*, 877 F.2d at 812-13; *Moore v. Harriman City Schools*, No. 92-5572, 1994 WL 18021, at 1 (6th Cir. Jan.21, 1994); *Waterman*, 739 F. Supp. at 365; *Pullen v. Botetourt County Sch. Bd.*, No. 94-686-R 1995 WL 738983, at 4 (W.D.Va. Feb. 13, 1995)). By contrast, allegations of physical assault or sexual abuse of a student by a school staff member or administrator would fall outside of the scope of the IDEA since they are not related to the way that a school provides education. (footnote omitted).

Under this interpretation of the exhaustion provision, allegations relating to school discipline are deemed as claims available under the IDEA and are subject to the exhaustion of administrative remedies requirement of the IDEA. By contrast, allegations relating to physical assault or abuse are deemed as claims outside the scope of the IDEA and are not subject to the exhaustion of administrative remedies requirement.

In the case at hand, Meers and Rogers specifically claim:

> Medley verbally threatened and harassed Joey throughout the school year. She humiliated him by telling his [sic] he ate like an animal. Medley repeatedly and abusively berated Joey for his inability to stop drooling. She threatened him with a balled fist if he could not or did not do what she told him to do. Medley also physically abused him and treated him roughly under the guise of assisting him. Joey was also greatly distress [sic] as he witnessed Medley physically and mentally abuse other students in the FMD [Functional Mental Disabilities] class on a daily basis and he was forced to withstand the hostile classroom environment. . . .
>
> Leslie was also subject to Medley's daily verbal and physical abuse at least as far back as August 2000 and until March 2001 when Medley was (temporarily) removed from the classroom. Leslie was harassed, verbally assaulted and humiliated by Medley. Medley also repeatedly used abusive and unnecessary physical restraint with Leslie, stepping on Leslie's hair, pinching her buttocks and bending her fingers back among other things. Leslie has also come home from school with scratches and red marks on her after

> her mother and guardian, Lynn Meers, complained to the school of Leslie's treatment at the High School.

Appellant's Brief at 9-10.

We do not view Meers' and Rogers' allegations as encompassing "general disciplinary practices." Rather, we think the allegations asserted by Meers and Rogers are best described as allegations of physical and mental assault and/or abuse, which are not within the scope of the IDEA. Our decision is further supported by the report of the Cabinet for Families and Children. This report substantiated that adult "abuse" had occurred by Medley against students in her classroom.[1]

Accordingly, we are of the opinion that Meers' and Rogers' claims are not within the scope of the IDEA and, thus, exhaustion of administrative remedies under the IDEA is not required. As such, we conclude the circuit court erroneously entered summary judgments dismissing Meers' and Rogers' actions.

For the foregoing reasons, the orders of the Shelby Circuit Court are reversed and these causes are remanded for proceedings not inconsistent with this opinion.

---

[1] Additionally, even if the Individuals With Disabilities Education Act (IDEA) (20 U.S.C.A. § 1400-1491o (West 2003 & Supp. 2004)) were applicable, we harbor grave doubt as to whether Meers' and Rogers' civil rights claims under Kentucky Revised Statutes Chapter 344 would be subject to the exhaustion of remedies requirement of the IDEA.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

F. Larkin Fore
Sarah N. Fore
FORE, MILLER & SCHWARTZ
Louisville, Kentucky

BRIEF FOR APPELLEE, DEBBIE MEDLEY:

John Frith Stewart
Stephen C. Emery
SEGAL, STEWART, CUTLER, LINDSAY, JANES & BERRY, PLLC
Louisville, Kentucky

BRIEF FOR APPELLEES, JIM FLYNN, MARY COMER AND LEON MOONEYHAN:

John C. Fogle, III
CHENOWETH LAW OFFICE
Frankfort, Kentucky

Commonwealth Of Kentucky
Court Of Appeals

No. 2003-CA-001003-MR

LYNN MEERS, AS GUARDIAN FOR LESLIE MEERS — APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT ACTION NO. 02-CI-00077

DEBBIE MEDLEY, ET AL — APPELLEES

AND No. 2003-CA-001008-MR

JOEY ROGERS — APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT ACTION NO. 02-CI-00076

DEBBIE MEDLEY, ET AL — APPELLEES

* * *

PREHEARING CONFERENCE ORDER

The prehearing conference in the above appeals was held in Louisville, Kentucky on August 28, 2003. No disposition was made of these appeals at that conference. It is hereby ORDERED that these appeals be consolidated for all purposes. It is further ORDERED that they proceed in accordance with the Kentucky Rules of Civil Procedure and that the time for all further steps, subsequent to the notice of appeal, shall commence to run from the entry of this order, except as stated below:

1. The Shelby Circuit Court Clerk shall have thirty (30) days from the date of this order to certify the record on appeal.

2 The Appellants in cases 2003-CA-001003, and 2003-CA-001008, shall file one (1) brief, not to exceed fifty (50) pages, within sixty (60) days from the date the record is certified.

3. The Appellees shall file their briefs, not to exceed fifty (50) pages, within sixty (60) days from the date the Appellants' brief is filed.

4. The Appellants shall file one (1) reply brief, not to exceed ten (10) pages, within fifteen (15) days from the date the last Appellee's brief is filed.

ENTERED: Aug 29, 2004

/s/ Philip B. Swain
CONFERENCE ATTORNEY

Commonwealth Of Kentucky
Court Of Appeals

No. 2003-CA-001003-MR

LYNN MEERS, AS GUARDIAN
FOR LESLIE MEERS — APPELLANT

V. — APPEAL FROM SHELBY CIRCUIT COURT HONORABLE WILLIAM F. STEWART JUDGE
CIVIL ACTION NO. 02-CI-00077

DEBBIE MEDLEY; JIM FLYNN;
MARY COMER; AND
LEON MOONEYHAN — APPELLEES

AND — No. 2003-CA-001008-MR

JOEY ROGERS — APPELLANT

V. — APPEAL FROM SHELBY CIRCUIT COURT HONORABLE WILLIAM F. STEWART JUDGE
CIVIL ACTION NO. 02-CI-00076

DEBBIE MEDLEY; JIM FLYNN;
MARY COMER; AND
LEON MOONEYHAN — APPELLEES

ORDER
DENYING PETITION FOR REHEARING

* * *

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is hereby ORDERED that the petition is DENIED.

ENTERED: Dec. 22, 2004

/s/ John D. Minton, Jr.
JUDGE, COURT OF APPEALS

NO. 02-CI-00077 SHELBY CIRCUIT COURT

LYNN MEERS, as Guardian for Leslie Meers PLAINTIFF

vs. –

DEBBIE MEDLEY, JIM FLYNN,
MARY COMER, LEON MOONEYHAN DEFENDANTS

* * *

ORDER

Upon motion being made, and the Court being sufficiently advised, IT IS HEREBY ORDERED that this action be DISMISSED with prejudice.

There being no just cause for delay, this is a final and appealable order.

/s/ William F. Stewart
JUDGE, SHELBY
CIRCUIT COURT

4/24/03
DATE

John Fogle
Juliette House
Jonathan McCarrick
John McNeil

NO. 02-CI-00076 SHELBY CIRCUIT COURT

JOEY ROGERS PLAINTIFF

vs. –

DEBBIE MEDLEY, JIM FLYNN,
MARY COMER, LEON MOONEYHAN DEFENDANTS

* * *

ORDER

Upon motion being made, and the Court being sufficiently advised, IT IS HEREBY ORDERED that this action be DISMISSED with prejudice.

There being no just cause for delay, this is a final and appealable order.

/s/ William F. Stewart
JUDGE, SHELBY
CIRCUIT COURT

4/24/03
DATE

F. Larkin Fore
John Frith Stewart
John McNeil
John Fogle

Supreme Court of Kentucky
2005-SC-0057-D
(2003-CA-1003 & 2003-CA-1008)

JIM FLYNN, MARY COMER
and LEON MOONEYHAN — MOVANTS

V. SHELBY CIRCUIT COURT
NOS. 2002-CI-0076 & 2002-CI-0077

LYNN MEERS, AS GUARDIAN FOR
LESLIE MEERS AND JOEY ROGERS
and DEBBIE MEDLEY — RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED August 17, 2005

/s/ Joseph E. Lambert
Chief Justice